United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

74-1878

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

THEODORE KOSS and KOSS SECURITIES CORPORATION, :

Defendants-Appellants. :

- x

PETITION FOR RE-HEARING

- x

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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Defendants-Appellants. :

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PETITION FOR RE-HEARING

Pursuant to Rule 40, Federal Rules of Appellate Procedure, the appellants, Theodore Koss and Koss Securities Corporation, petition for re-hearing of their appeal, in which this Court affirmed a judgment of conviction on November 15, 1974.

I.

This Court's opinion stated that Koss' (p. 423):

> " *** immediate stake in the conspiracy was the receipt of his $2,500[1] commission for the sale of 15,000 shares, which he otherwise would have lost."

Payment of such commission was not one of the objects of the conspiracy charged in the indictment, which alleged that the objects of the conspiracy were to obtain money and property by fraud in the purchase and sale of securities (A4-5).

In order for Koss to be a participant in the conspiracy, it was necessary for him to have "a stake in the outcome" of the conspiracy charged in the indictment, and not some other incidental benefit therefrom. United States v. Falcone, 109 F.2d

1. Koss' compensation as underwriter was 10¢ per share for selling subscriptions to 15,000 shares, amounting to $1,500, plus expenses of 5¢ per share, amounting to $750, a total of $2,250, not $2,500.

579 (C.A.2, 1940), affd. 311 U.S. 205 (1940).

This Court's opinion also stated (p. 423):

"Koss acted in furtherance of the conspiracy during the offering by violating his duty as an underwriter to disclose material information through an amended offering circular."

We submit that even if Koss had a duty as an underwriter to disclose material information through an amended offering circular, his non disclosure of such information, standing alone, was not sufficient to make him a participant in the Hellerman group's conspiracy alleged in the indictment.

In United States v. Cianchetti, 315 F. 2d 584, 588 (C.A.2, 1963), the Court said:

"There must be something more than 'mere knowledge, approval of or acquiescence in the object or purpose of the conspiracy ***.' Cleaver v. United States, 238 F. 2d 766, 771 (10th Cir. 1956). This 'something more' is generally described as a 'stake in the outcome'. ***

*** Cianchetti's motives may not have been wholly laudatory, but the fact remains that the evidence shows that he did indeed abstain. He did not cast in his lot with the conspirators, did nothing to further the success of the enterprise, and had no stake in its outcome. His conviction must be reversed."

This Court's opinion also stated (p. 423):

"Thereafter he was in fact successful in increasing his share of the profits of the manipulation by threatening to sell the 15,000 shares on the open market rather than putting them under Hellerman's control."

Koss' ledger sheet of transactions for his own account (GX77) showed a loss of $1,205, instead of a profit from trading in AIS shares; and it also showed that Koss bought 4,300 shares of AIS after the price dropped sharply in June 1971. Such buying is not consistent with Hellerman's oral testimony that

Koss asked to be allowed to participate in the conspiracy to raise the price of AIS shares, and to sell such shares at such fraudulently inflated prices.

This Court's opinion also stated (p. 423):

> "Thereafter, he helped Hellerman gain control over the 15,000 shares he had sold, going so far as to buy AIS from his own customers at below the market price.[2] He also bought shares for his firm, at the same time he was recommending sales to his customers."

We submit that Koss' buying of shares from his own customers, and re-sale of some of such shares to the Hellerman group, is not evidence of his participation in the Hellerman conspiracy, because the tabulations on pages 14-15 of our main brief show that between March 16 and April 16, 1971, Koss also sold 1,900 shares into the market to brokers not connected with Hellerman, and thereafter Koss sold 900 more shares to brokers not connected with Hellerman. Such sales are strong documentary evidence that Koss acted contrary to the attempts of the Hellerman conspirators to control the market in AIS shares. This refutes Hellerman's oral testimony that Koss agreed to join the Hellerman conspiracy, and that he agreed not to "bang the market", and to sell his shares in co-operation with the Hellerman' group's sales of its shares.

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2. Koss could not obtain for his customers the rigged higher prices for AIS shares which the Hellerman group was paying only for its own "wash" buys thereof, and not to outsiders like Koss. Significantly, Koss' few sales of AIS shares for more than $1.50 per share were made to brokers other than Dopler-Gray, which was Hellerman's market maker. Moreover, the limited over-the-counter market for AIS shares made Hellerman one of the few available buyers of AIS shares; and Hellerman tried to buy all AIS shares that came into the market, to keep the price of AIS shares from dropping.

II.

Koss' non disclosure of Hellerman's purchase of about 45,000 AIS shares of the 65,000 share underwriting thereof; his sales of 5,000 AIS shares to Hellerman's broker, Interstate Equities; the $500 paid him by Hellerman for guaranteeing stockholders' signatures on stock certificates; and the 1% of proceeds which Hellerman paid him for cashing 3 checks at Koss' bank; were not distributions to Koss of "a stake in the outcome" of the Hellerman conspiracy. Instead, they were [illegible] payments for specific incidental and subordinate services.

Performance of services which further the execution of a conspiracy, and acceptance of compensation therefor, standing alone, is not sufficient to constitute participation in such conspiracy, as a member thereof.

In Ingram v. United States, 360 U.S. 672, (1959), Ingram was the banker, and Jenkins was a part owner of a numbers gambling operation which was illegal under Georgia law. Smith and Law were employed to do minor clerical work in such numbers operation. The conviction of Ingram and Jenkins of conspiracy to evade payment of federal gambling taxes was affirmed, but the conviction of Smith and Law of the same conspiracy was reversed, on the ground that their actions as minor clerical workers did not necessarily give them knowledge that Ingram and Jenkins had not paid the federal gambling tax. The Court said (360 U.S. at 677-678):

> "As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a

"finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter."

In United States v. Calamaro, 354 U.S. 351 (1956), the Court reversed the convictions of "runners" employed by operators of illegal numbers games, and held that such "runners" were not participants in such operators' conspiracy to violate federal laws in their operation of such illegal numbers games.

In Drake v. United States, 355 F. Supp. 710, 714-715 (D.C. Mo., 1973), the Court said:

"The question presented for determination is whether either Jack W. Klein or Jacqueline C. Klein are persons liable within the meaning of §4401(c). The government contends that by furnishing vital auditing functions and a place of operation the Kleins made themselves liable under this section. The kay words of the section are: 'Each person who is engaged in the business of accepting wagers' and each person who conducts any wagering pool or lottery' *** (emphasis supplied). A mere pick-up man or other employee who has no proprietary interest in the operation and who receives no wagers for his own account is not engaged in the business nor does he conduct a wagering pool or lottery, and is not liable for the tax. United States v. Calamaro, 354 U.S. 351, 77 S.Ct. 1138, 1 L.Ed.2d 1394 (1957); Ingram v. United States, 259 F. 2d 886 (5th Cir.,1958), affirmed in part, reversed in part on other grounds 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 96; United States v. Bowen, 411 F.2d 923 (5th Cir., 1969)."

III.

The indictment alleged (A4-5):

"18. It was part of said conspiracy that the defendants *** in the offer and sale of securities *** by the use of means and instruments of transportation and communications in interstate commerce and by use of the mails, would directly and indirectly (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements *** and (c) engage in transactions *** which operated and would operate as a fraud *** ."

The above-quoted allegations in the indictment were legally insufficient to charge a conspiracy to violate the mail fraud statute, 18 U.S.C. §1341, because they did not allege that the defendants conspired to use the mails "for the purpose of executing the scheme". United States v. Maze, 414 U.S. 395 (1973); Kann v. United States, 323 U.S. 88, 84 (1944); Parr v. United States, 363 U.S. 370 (1960).

The above-quoted allegations in the indictment that (A4):

> "It was part of said conspiracy that the defendants *** by use of the mails, would *** "

commit frauds in the offer and sale of securities, were legally insufficient, because they merely alleged that the defendants conspired to commit frauds by use of the mails, and not that they conspired to use the mails "for the purpose of executing the scheme".

In United States v. Maze, supra, 414 U.S. 395, 38 L.Ed.2d 603, 608, 611 (1973), the Court said:

> "Under the statute, the mailing must be 'for the purpose of executing the scheme, as the statute requires.' Kann v. United States, 323 U.S. 88, 94, 89 L. Ed. 89, 65 S. Ct. 148, 157 ALR 406 (1944) *** ."

> "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such a scheme or artifice...' Since the mailings in this case were not for that purpose, the judgment of the Court of Appeals is affirmed."

The conspiracy count in the indictment charged the defendants with conspiring to violate the mail fraud statute, 18 U.S.C. §1341, as well as the securities statutes, 15 U.S.C. sections 77q(a); 77(x); 78j(b); 78ff; and Rule 10b-5 (17 CFR 240-10b-5). (A4).

The failure to allege in the indictment that the defendants conspired to use the mails "for the purpose of executing the scheme", invalidates Koss' convictions of the conspiracy count, and, also of the mail fraud counts, Nos. 3, 5, 8, and 11. United States v. Alsondo, 486 F. 2d 1339, 1345 (C.A.2, 1973), certiorari granted sub. nom. United States v. Feola, 94 S.Ct. 1932, 40 L.Ed.2d 285 (1974); Mills v. United States, 164 U.S. 644, 649, 17 S.Ct. 210, 41 L.Ed. 584 (1897); Nicola v. United States, 72 F.2d 780, 787 (C.A.3, 1934).

IV.

In sustaining Koss' conviction of count 4 of the indictment which charged him with failure to deposit in escrow the money he received from customers in payment for subscriptions to the all or nothing offering of AIS shares, this Court said (p. 424);

> "The jury justifiably did not credit Koss' argument that there was no proof that he received more than $3,000 before the very end of the offering in early March. The greatest difficulty with that explanation was that the December deposit would have had to have been in part an advance deposit intended to cover the payments which the government proved Koss received in January and February. However, such an advance deposit would have served no purpose other than to tie up the firm's own funds unnecessarily. Moreover, such an advance deposit seems markedly inconsistent with Koss' attitude toward the account. Koss told Zardus in February not to deposit in escrow a check Interstate had received from an AIS purchaser, because the offering might not be successful. Koss also never deposited a single customer's check to the account, even though there was no reason not to deposit directly checks which were solely in payment for AIS shares. Finally, the jury could have concluded that one reason Koss delayed paying AIS the net proceeds from the 15,000 shares was that the money had been commingled with the firm's own funds and used in its business."

The Government's brief conceded that (p. 27):

> " *** the Government did not prove exactly when Koss was paid for those shares *** ";

and the Government's brief argued that:

> " *** the Government did prove that Koss received two checks (GXs 31(b) and 34) in January, and that no deposits were made into the escrow account between December 31, 1970 and March 4, 1971."

GX31-b was a check for $300, dated January 21, 1971. GX34 was a check for $1,225, dated January 7, 1971, of which only $600 was given to pay for subscription to AIS shares, the remaining $625 having been given to pay for other shares. Such $900 received in January, 1971, was more than covered in escrow by the $3,000 which Koss deposited in escrow on December 30, 1970.

The tabulations in our main brief (p. 36) show that between December 16, 1970 and March 2, 1971, Koss received $2,600 in payment for subscriptions to AIS shares, including the $900 represented by GX31(b) and GX34. Therefore, such entire $2,600 was more than covered by Koss' $3,000 escrow deposit on December 30, 1970.

Checks like GX34, which paid for other shares, in addition to AIS, could not be deposited in the escrow account.

It was not convenient to deposit subscription checks directly in the escrow account, because the escrow bank was in New Jersey; an activity charge would apply to deposits of many

individual checks; and a service charge would be made for returned checks not paid by the bank on which they were drawn, for insufficient funds, or for other reasons.

There was no evidence that the $3,000 which Koss deposited in escrow on December 30, 1970, consisted of money he received before that date in payment for subscriptions to AIS shares; and there was no factual basis for any such inference.

We submit that Koss should not be convicted of this count on a mere guess or surmise that the $3,000 which Koss deposited in escrow on December 30, 1970, consisted of money he received before that date in payment for subscriptions to AIS shares, when there is no such evidence in the record.

V.

We submit that the entry in Koss' blue questionnaire from the S.E.C. that his firm sold 4,400 AIS shares to Zardus' firm between April 7-14, 1971, and the evidence at the trial that Koss sold 5,000 AIS shares to that firm during that period, does not support Koss' conviction for violation of 18 U.S.C. §1001, because there was no evidence that Koss "knowingly and wilfully" falsified or concealed any material fact by this difference in numbers. Koss had no motive to report to the S.E.C. that he sold only 4,400 AIS shares, instead of 5,000 shares. Koss had nothing to conceal, and nothing to gain by reporting to the S.E.C. that he sold only 4,400 shares, instead of 5,000 shares. Koss' report that he sold only 4,400 shares was clearly an unintentional clerical error. It was not

a knowing and wilful falsification or concealment of any material fact.

As to other differences between entries of dates, prices, or other information in Koss' confirmations and order tickets about the same transactions, the Government similarly failed to prove that Koss "knowingly and wilfully" falsified or concealed any material fact, or that he had any motive for such different entries about the same transactions.

Moreover, such differences in entries in Koss' records about the same transactions did not have the effect of falsifying or concealing any material fact, because Koss voluntarily gave to the S.E.C. all the records it asked him to produce, containing such different entries; and Koss also gave such records to the United States Attorney for his use at the trial of this indictment, pursuant to subpoena duces tecum served after Koss was arraigned on the indictment herein.

Koss' delivery of his records to the S.E.C. and to the United States Attorney, disclosed such differences in entries in his records, and thereby negated and refuted any charge that Koss knowingly and wilfully falsified and concealed such records containing such differences in entries; for if he had known that such entries were different before he delivered his records he would have corrected his records to eliminate such differences.

CONCLUSION

THE PETITION FOR RE-HEARING SHOULD BE GRANTED.

December 5, 1974.

Respectfully submitted,

N. GEORGE TURCHIN
of counsel

MORRIS WEISSBERG
Attorney for Appellants

US COURT OF APPEALS: SECOND CIRCUIT

Index No.

USA,

Appellee,

against

KOSS AND KOSS SEC. CORP.,

Defendants-Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortegá, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 6th day of December 1974 at Foley Square, New York

deponent served the annexed Petition for Re-hearing upon

Paul J. Curran

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 6th day of December 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975